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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

BRIAN SETENCICH,

No. C 07-03688 SBA

Plaintiff,

ORDER

v.

[Docket Nos. 29-31]

THE AMERICAN RED CROSS, a non-
profit corporation; STEVE BROWN;
ROBERT BROWNING; and DOES 1
through 30, inclusive,

Defendants.

INTRODUCTION

Before the Court is defendant The American Red Cross' Motion to Dismiss Plaintiff Brian Setencich's First Amended Complaint [Docket No. 29], defendant Steven Brown's Motion to Dismiss Plaintiff Brian Setencich's First Amended Complaint [Docket No. 30], and defendant Robert Browning's Motion to Dismiss Plaintiff Brian Setencich's First Amended Complaint [Docket No. 31].

Plaintiff Brian Setencich has sued each defendant for association discrimination under the California Fair Employment and Housing Act (FEHA), California Government Code section 12900, *et seq.*, and for fraud and negligent misrepresentation. Each defendant seeks dismissal under Federal Rule of Civil Procedure 12(b)(6). The Court finds this matter is appropriate for resolution without a, hearing under Fed. R. Civ. P. 78(b), and for the reasons discussed below, GRANTS and DENIES the defendants' motions, as follows:

(1) the Court DENIES the Red Cross' motion on Setencich's first claim for association discrimination under the FEHA;

(2) the Court GRANTS Steve Brown's motion and Robert Browning's motion on Setencich's first claim for association discrimination under the FEHA with prejudice;

(3) the Court GRANTS the Red Cross', Steve Brown's, and Robert Browning's motions on Setencich's second claim for fraud, without prejudice; and

1 (4) the Court DENIES the Red Cross', Steve Brown's, and Robert Browning's motions
2 on Setencich's third claim for negligent misrepresentation.

3 4 **BACKGROUND¹**

5 **1. Factual History**

6 Defendant The American Red Cross (the "Red Cross") is a non-profit corporation,
7 authorized to do business in the State of California. Docket No. 28 (First Am. Compl., ¶ 4). At the
8 time plaintiff Brian Setencich filed his First Amended Complaint, on November 8, 2007, defendant
9 Steve Brown was the Vice President of the Red Cross' Western Region. *Id.* at 1, ¶ 5. And, at this
10 time, defendant Robert Browning was its Director of Human Resources. *Id.*

11 In mid- to late-2005, defendants recruited Setencich to work as the Communication Manager
12 for the Red Cross' Blood Services, Western Region, Division because of his excellent
13 communication skills and extensive experience in working with the public. *Id.*, ¶¶ 2, 14. He was a
14 perfect fit and filled an important need for the Red Cross. *Id.*, ¶ 2. In the recruited position he
15 would have been working directly for Marc Jackson, Red Cross' Director of Public Affairs and
16 Communications. *Id.*

17 Setencich interviewed in Southern California and met with decision-makers on
18 approximately three occasions. *Id.*, ¶¶ 15, 24. He received positive reviews from the hiring panel
19 and decision-makers. *Id.*, ¶ 15. Defendants made specific representations it intended to hire him:
20 During his first visit, he told defendants he had been convicted of filing a false tax return in 1997,
21 where he failed to pay taxes on a stock dividend from TCBY Yogurt, with tax consequences less
22 than \$10,000. *Id.*, ¶ 24. Defendants told Setencich a criminal conviction was not an impediment to
23 hire and numerous individuals with convictions had been hired in the past. *Id.*

24 Also, in June, 2005, the Human Resource Representative who reviewed Setencich's
25 application and written statement describing the criminal conviction informed Setencich the
26 conviction would not stop his hire. *Id.*, ¶ 25. And, in late 2005, Brown took him aside, put his arm
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28 ¹The facts are taken from plaintiff Brian Setencich's First Amended Complaint. [Docket No. 28.]

1 around him and told him: they had worked with people with criminal backgrounds before; they
2 liked to give people second chances; they hire people for what they can bring to the table; and, they
3 wanted to hire him. *Id.* Brown reiterated this to Setencich in around March, 2006. *Id.* Browning
4 also told him his criminal background would not impede his hire. *Id.* These statements were
5 republished to him and others, confirming he would be hired, until around the summer of 2006. *Id.*
6 Defendants were lying and knew they were lying, when they made these statements. *Id.*, § 26.

7 Jackson found plaintiff the most qualified for the position, as did those on the hiring panel.
8 *Id.*, ¶ 16. The decision was made to hire him. *Id.* Defendants, however, attempted to withdraw the
9 decision, when they learned of his association with Jackson. *Id.*, ¶¶ 8, 15, 17.

10 Jackson's and Setencich's association had begun in the early 1990s when Setencich was on
11 the Fresno City Counsel and Jackson was the Director of Public Relations and Editor in Chief for the
12 Metro News. *Id.*, ¶ 6. They worked on several issues together, and learned they worked well
13 together. *Id.* Then, in 1994, Setencich was elected State Assemblyman for the 30th District and
14 made Jackson his Chief of Staff. *Id.* In 1997, when Setencich became Special Liaison to the Mayor
15 of San Francisco, Jackson began working for defendants, in Southern California. *Id.*, ¶ 7.

16 A director for them since 1997, Jackson he had won a multitude of national awards for the
17 work he had performed for the Red Cross. *Id.*, ¶ 3. When defendants, however, learned of his
18 psoriatic arthritis, a chronic condition protected under the FEHA, they discriminated against him,
19 denied him a reasonable accommodation, and attempted to force him to quit. *Id.* In addition, they
20 began retaliating against him due to his protected activities, including protesting their illegal
21 conduct. *Id.* Jackson thus needed the assistance of a Communication Manager to accommodate not
22 only his disability, but the growth of his department and to counter defendants' attempts to
23 undermine him and set him up to fail. *Id.*, ¶ 16.

24 This is because defendants were attempting to force Jackson out, given his use of family
25 medical leave, disability, and protected activity. *Id.*, ¶ 15. *Id.*, ¶ 8. Thus, instead of hiring

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1 Setencich, defendants articulated a pretextual reason for not doing so.² *Id.*, ¶ 17. Instead, they hired
2 other convicted felons and used them for their ads and campaigns. *Id.*, ¶ 26.

3 **2. Procedural History**

4 Setencich discovered defendants had defrauded him, around September 2006. *Id.*, ¶ 27. At
5 some point, he filed a claim with the California Department of Fair Employment and Housing.³ *Id.*,
6 ¶ 12. On March 13, 2007, he sued the Red Cross, Brown, and Browning, in San Francisco Superior
7 Court, in case number 07-461264. *See* Docket No. 1 (Notice of Removal). On July 19, 2007, the
8 Red Cross removed the case to this Court, under 36 U.S.C. § 300105.⁴ *Id.* On July 24, 2007, the
9 Red Cross filed a motion to dismiss [Docket No. 9], which was mooted, when Setencich filed a First
10 Amended Complaint [Docket No. 28], on November 8, 2007. Docket No. 36 (Order).

11 In this amended pleading, he claimed due to defendants' conduct, intentional, malicious, or
12 otherwise, he suffered humiliation, severe anxiety, physical ailments due to stress, mental anguish,
13 extreme mental and emotional distress, medical expenses, and lost earning capacity, compensation,
14 and health and welfare benefits. *Id.*, ¶¶ 19, 21-22, 28-29. Their conduct also caused him to avoid
15 seeking other employment. *Id.*, ¶ 28. As a result, he sought compensatory and punitive damages, as
16 well as fees and costs. *Id.*, ¶¶ 21, 28-30, 34-35, at 6-7.

17 Then, on November 27, 2007, defendants each filed a motion to dismiss the first amended
18 complaint. [Docket Nos. 29-31.]

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22 ² Setencich, however, does not share it with the Court.

23 ³ Presumably, he received a right-to-sue notice, or waited the statutorily mandated time before
24 suing, without any action by the DFEH.

25 ⁴ Title 36 U.S.C. § 300105(a)(5) provides the Red Cross has the power to "sue and be sued in
26 courts of law and equity, State or Federal, within the jurisdiction of the United States." The Supreme
27 Court has interpreted this provision in *The American National Red Cross' federal corporate charter as*
28 *conferring "original jurisdiction on federal courts over all cases to which the Red Cross is a party, with*
the consequence that the organization is thereby authorized to remove from state to federal court any
state-law action it is defending." *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 248 (1992);
see also K.V. Mart Co. v. United Food & Commercial Workers Int'l Union, 173 F.3d 1221, 1224 (9th
Cir. 1999) (per curiam); *Williams v. Leonard*, 2003 WL 163183, at *1 (N.D. Cal. 2003).

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1 not hire him, because it was discriminating against him for his association with, and ultimately in
2 order to punish, Jackson, because of his disability. RC Mot. at 4:3-7.

3 **B. Legal Standards**

4 **i. The California Fair Employment and Housing Act**

5 With regards to discrimination in employment and housing, the California legislature has
6 stated, in the FEHA:

7 It is hereby declared as the public policy of this state that it is necessary to protect
8 and safeguard the right and opportunity of all persons to seek, obtain, and hold
9 employment without discrimination or abridgment on account of race, religious
10 creed, color, national origin, ancestry, physical disability, mental disability, medical
11 condition, marital status, sex, age, or sexual orientation.

12 Cal. Gov. Code § 12920, 1st para.; *see Aguilar v Avis Rent A Car, Inc.*, 21 Cal.4th 121, 129, 87
13 Cal.Rptr.2d 132, 980 P.2d 846 (1999).

14 Further, “[t]he provisions of this part shall be construed *liberally* for the accomplishment of
15 the purposes of this part.”⁵ Cal. Gov. Code, § 12993(a); *see Aguilar*, 29 Cal.4th at 129. And,
16 “nothing contained in this part shall be construed, in any manner or way, to limit or restrict the
17 application of Section 51 of the Civil Code [the Unruh Act].”⁶ Cal. Gov. Code, § 12993(c).

18 The FEHA itself provides:

19 It shall be an unlawful employment practice ...:

20 (a) For an employer, because of the race, religious creed, color,
21 national origin, ancestry, *physical disability, mental disability, medical condition*,
22 marital status, sex, age, or sexual orientation of any person, to *refuse to hire or*
23 *employ the person*

24 *Id.* § 12940 (emphasis added).

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27 ⁵The term “part” refers to the FEHA, which is contained in part 2.8 of division 3 of title 2 of the
28 California Government Code.

⁶*See supra* note 5.

1 In 1980, the California Legislature amended the FEHA to incorporate the Unruh Act,
2 California Civil Code section 51, *et seq.* It added section 12948 which stated, “It is an unlawful
3 practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights
4 created by Section 51 ... of the Civil Code.” 1980 Cal. Stats., ch. 992, sec. 4.

5 In 1999, the legislature expressly amended the FEHA to bar “association discrimination.” It
6 stated the terms “[r]ace, religious creed, color, national origin, ancestry, physical disability, mental
7 disability, medical condition, marital status, sex, age, or sexual orientation’ includes a perception
8 that ... the person is associated with a person who has, or is perceived to have, any of those
9 characteristics.” *Id.* § 12926(m).

10 When the legislature added subdivision (m), it stated, “The amendments made by this act to
11 ... Sections 12926 ... of the Government Code do not constitute a change in, but are *declaratory of*
12 *existing law.*” 1999 Cal. Stats, ch. 591, sec. 16 (emphasis added).

13 With regards to the relationship between the FEHA and the Americans with Disabilities Act,
14 42 U.S.C. § 12101, *et seq.*, the California Legislature has stated:

15 The law of this state in the area of disabilities provides protections
16 independent from those in the federal Americans with Disabilities Act of 1990
17 (Public Law 101-336). *Although the federal act provides a floor of protection, this*
18 *state’s law has always, even prior to passage of the federal act, afforded additional*
19 *protections.*

20 Cal. Gov. Code § 12926.1(d) (emphasis added).

21 **ii. The Unruh Act**

22 Section 51 of the California Civil Code states, in part:

23 All persons within the jurisdiction of this state are free and equal, and no
24 matter what their sex, race, color, religion, ancestry, national origin, *disability,*
25 *medical condition,* marital status, or sexual orientation are entitled to the full and
26 equal accommodations, advantages, facilities, privileges, or services in all business
27 establishments of every kind whatsoever.

28 Cal. Civ. Code § 51(b) (emphasis added).

1 The legislature added the terms “blindness or other physical disability” to this section in
2 1987, 1987 Cal. Stats. 1987, ch. 159, sec. 1, but in 1992, changed them to “disability,” stating:

3 It is the intent of the Legislature in enacting this act to strengthen California law in
4 areas where it is weaker than the Americans with Disabilities Act of 1990 (Public
5 Law 101-336) and *to retain California law when it provides more protection for*
6 *individuals with disabilities than the Americans with Disabilities Act of 1990.*

7 1992 Cal. Stats., ch. 913, secs. 1, 3 (emphasis added).

8 In 2000, the legislature added certain FEHA definitions to the Unruh Act, e.g., under this act,
9 “disability” means any mental or physical disability as defined in sections 12926 and 12926.1 of the
10 Government Code, and “medical condition” has the same meaning as defined in subdivision (h) of
11 section 12926 of the Government Code. Cal. Gov. Code § 51(e)(1)-(2); 2000 Cal. Stats., ch. 1049,
12 sec. 2.

13 Likewise, as of 2000, the Unruh Act *expressly prohibits association discrimination.* Under
14 the act, the terms:

15 “[s]ex, race, color, religion, ancestry, national origin, *disability, medical condition,*
16 *marital status, or sexual orientation*” includes a perception that ... the person is
17 associated with a person who has, or is perceived to have, any particular
18 characteristic or characteristics within the listed categories.

19 Cal. Civ. Code § 51(e)(5); 2000 Cal. Stats., ch. 1049, sec. 2.

20 Long before these express amendments, however, California courts construed the Unruh Act
21 as broadly prohibiting association discrimination. In 1991, in *Harris v. Capital Growth Investors*
22 *XIV*, the California Supreme Court reiterated an earlier 1970 decision, where:

23 petitioner entered the Northgate Shopping Center in San Rafael, California, intending
24 to make a purchase. Upon arrival he saw a friend standing on the sidewalk of the
25 shopping center. Petitioner, on a Honda motorcycle belonging to his father, pulled up
26 to the curb and proceeded to talk with this young man, who wore long hair and
27 dressed in an unconventional manner.

28 *In re Cox*, 3 Cal.3d 205, 212, 474 P.2d 992 (1970).

1 After one of the men purchased a drink, and sat down on a public bench, police arrested both
2 of them for trespass, for refusing to leave when asked. *Id.* at 210. One of the men challenged his
3 arrest under the Unruh Act. *Id.* at 209. “We held that a shopping center did not have the right to
4 exclude the customer *based only on his association with a young man ‘who wore long hair and*
5 *dressed in an unconventional manner.’” Harris v. Capital Growth Investors XIV, 52 Cal.3d 1142,*
6 *1152, 805 P.2d 873 (1991) (emphasis added).*

7 The California Appellate Court applied the *Cox* holding in *Winchell v. English*, 62
8 Cal.App.3d 125, 133 Cal.Rptr. 20 (1976), finding operators of a mobile home court had illegally
9 discriminated against plaintiffs and their tenants, when they subrented space to, and associated with,
10 “persons of the black race.” The Court noted the act “refers ... to *any discrimination on account of*
11 *color ... [and was] not limited in ... operation to the color (or other feature) of the person who is the*
12 *immediate object of the discrimination.*” *Id.* at 129 (emphasis added). Thus, the court thus held
13 businesses could not discriminate against “one’s right of association on account of the associates’
14 color” *Id.* (emphasis added).

15 As the court also noted:

16 “The Act is to be given a liberal, and not a strict, construction with a view to effect its object
17 and to promote justice.” *Id.* at 128. “As with all statutes, it must be construed in the light of the
18 legislative purpose and design. In enforcing the command of a statute both the policy expressed in
19 its terms, and the object implicit in its history and background, should be recognized.” *Id.*

20 **C. Analysis**

21 There are apparently no California cases addressing the issue of disability-based association
22 discrimination or what constitutes an “association” under the FEHA. Based on a review of the
23 relationship between the FEHA, the Unruh Act, and the ADA, however, it is clear, regardless of
24 what the ADA defines as “association discrimination,” the FEHA would define Setencich’s and
25 Jackson’s relationship as an “association.”

26 To state a cause of action under the FEHA, a “plaintiff must generally show that: he or she
27 was a member of a protected class; was qualified for the position he sought; suffered an adverse
28 employment action, and there were circumstances suggesting that the employer acted with a

1 discriminatory motive.” *Jones v. R.J. Donovan Corr. Facility*, 152 Cal.App.4th 1367, 1379, 62
2 Cal.Rptr.3d 200 (2007).

3 Setencich alleges although he was qualified, the Red Cross refused to hire him because of his
4 association with Jackson, who allegedly is disabled under the FEHA. If Setencich and Jackson have
5 an association, then taking these facts as true, he has stated an association discrimination claim
6 under the FEHA.

7 Rather clearly, in 1970, the California Supreme Court made it clear, in *In re Cox*, that under
8 the Unruh Act, discrimination based on a mere acquaintance or friendship, could be sufficient to
9 trigger association discrimination. At this time, the Unruh Act did not expressly cover association
10 discrimination. Thus it existed in California, at common law. The *Cox* decision is thus an example
11 of the California courts according the act a broad liberal construction, construed in light of its
12 legislative purpose and design: to prevent arbitrary discrimination by businesses.

13 Like the Unruh Act, the FEHA is also designed to prevent arbitrary discrimination, but it
14 generally targets employment and housing providers. Nonetheless, it too is subject to a liberal
15 construction to accomplish its purposes. Cal. Gov. Code § 12993(a). Over time, while the Unruh
16 Act and the FEHA have not entirely merged, the California Legislature has evidenced a clear intent
17 to broaden and coordinate their protective operations, such that, by the time the events leading to
18 this suit occurred, both acts expressly barred association discrimination on the basis of a physical
19 disability, *see* Cal. Civ. Code § 51(e)(5); Cal. Gov. Code §§ 12940(a), 12962(m), and both were
20 designed to provide greater protections than the ADA, *see* 1992 Cal. Stats., ch. 913, secs. 1, 3; Cal.
21 Gov. Code § 12926.1(d). In addition they used a shared definition of a “physical disability,” Cal.
22 Civ. Code § 51(e)(1), and a violation of the former was a violation of the latter, Cal. Gov. Code
23 § 12948. Most importantly, when the legislature added the express provision to the FEHA, barring
24 association discrimination, it was considered declaratory of *existing law*. 1999 Cal. Stats, ch. 591,
25 sec. 16.

26 Thus, when the FEHA was amended to add an express provision covering association
27 discrimination, it included and incorporated prior law in this area, including case law developed
28 under the Unruh Act. Thus, under the California Supreme Court’s reasoning in *Cox*, Setencich and

1 Jackson need only be friends or acquaintances, to claim “association” discrimination under the
2 FEHA. According to Setencich, he and Jackson knew each other well for four years, before Jackson
3 worked for three years as Setencich’s chief of staff. They clearly have a closer relationship than the
4 two men in *Cox*, and thus can claim association discrimination.

5 To hold otherwise, given the intertwined nature of the two acts, would be to argue a
6 restaurant could refuse to serve persons outside protected classes, because they sat down to eat with
7 persons in protected classes, or that an employer could refuse to hire a person outside a protected
8 class, solely because he or she had a friend in a protected class. The Red Cross has not pointed the
9 Court to any case law so holding, and would probably be hard pressed to do so.

10 With regards to the Red Cross’ argument that it is illogical for Setencich to argue the Red
11 Cross was hiring someone for Jackson, at the same time it was trying to force him to quit, this is a
12 logical and consistent argument, if the Red Cross were merely engaged in behavior designed to
13 make it appear it were not discriminating against Jackson.

14 **D. Conclusion**

15 Taking Setencich’s facts as true, he has stated a claim for association discrimination under
16 the FEHA, against the Red Cross.

17 **2. Setencich has failed to state an association discrimination claim under the California** 18 **Fair Employment and Housing Act, against Brown or Browning.**

19 Setencich alleges Brown and Browning had supervisory positions with the Red Cross. As
20 Brown and Browning note, under the FEHA, plaintiffs may not sue supervisors for discrimination.
21 Cal. Gov. Code § 12940(a) (regulating “employer” conduct); *Reno v. Baird*, 18 Cal.4th 640, 643,
22 651-54, 957 P.2d 1333 (1998) (discrimination claims often arise from conduct indistinguishable
23 from common, everyday personnel decisions, and imposing liability for them would chill effective
24 management, without aiding in victims’ recovery); Docket No. 30 (Brown Mot. at 3:1-22); Docket
25 No. 29 (Browning Mot. at 3:1-23). Setencich does not oppose dismissal on this ground. Docket
26 No. 43 (Pl.’s Opp’n to Brown at 1:24-26); Docket No. 41 (Pl.’s Opp’n to Browning at 1:24-27). As
27 the parties agree, Setencich has failed to state an association discrimination claim under the FEHA,
28 against Brown or Browning.

1 **3. Setencich has failed to state a claim for fraud.**

2 **A. Allegations**

3 The Red Cross claims Setencich has failed to comply with Federal Rule of Civil
4 Procedure 9,⁷ by not providing “how, when, where, to whom and by what means” allegedly false
5 statements were made. RC Mot. at 4:15-5:4. It also claims Setencich has not shown any defendant
6 agreed or promised to hire him. *Id.* And, it alleges the fact it did not hire Setencich, absent further
7 facts, which he does not plead, does not support a claim it made a promise to hire him, on which he
8 could reasonably rely. *Id.* at 5:5-11. Brown’s and Browning’s oppositions are similar. *See* Brown
9 Mot., part III.C; Browning Mot., part III.C.⁸

10 Setencich opposes by generally claiming he has complied with Rule 9, and citing portions of
11 his first amended complaint, in support. Opp’n to RC, part III.C.

12 **B. Legal Standards**

13 In California, “One who willfully deceives another with intent to induce him to alter his
14 position to his injury or risk, is liable for any damage which he thereby suffers.” Cal. Civ. Code
15 § 1709. Stated another way, “The elements of fraud, which give rise to the tort action for deceit, are
16 (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity
17 (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting
18 damage.” *Lazar v. Superior Ct.*, 12 Cal.4th 631, 638, 49 Cal.Rptr.2d 377 (1996) (citing 5 Witkin,
19 Summary of Cal. Law, Torts, § 676, p. 778 (9th ed. 1988)).

20 A deceit, within the meaning of section 1709, is either:

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23 ⁷ Setencich initially filed in San Francisco Superior Court, and the Red Cross removed, so Rule 9
24 would have been inapplicable to his initial complaint; however, he filed his First Amended Complaint,
25 after removal, thus subjecting it to the Federal Rules of Civil Procedure’s pleading requirements.

26 ⁸ Browning and Brown also argue, however, the fraud claim is pre-empted by the FEHA, as both
27 claims arise from the same facts, and as they are immune from the latter, they must be immune from the
28 former, Browning Mot. at 5:1-6; Brown Mot. at 4:27-5:4. They cite no legal authority for this
 conclusion, however, apparently declining to actually research this topic for their motions. For his part,
 Setencich does not address their preemption argument, either. *See* Opp’n to Brown, part III.C; Opp’n
 to Browning, part III.C. The Court also declines the opportunity to consider a topic not briefed by the
 movants.

1 1. The suggestion, as a fact, of that which is not true, by one who does
2 not believe it to be true;

3 2. The assertion, as a fact, of that which is not true, by one who has no
4 reasonable ground for believing it to be true;

5 3. The suppression of a fact, by one who is bound to disclose it, or who
6 gives information of other facts which are likely to mislead for want of
7 communication of that fact; or,

8 4. A promise, made without any intention of performing it.

9 Cal. Civ. Code § 1710.

10 Subdivision (4) of section 1720 is known as “promissory fraud.” *Lazar*, 12 Cal.4th at 638.

11 In cases of fraud, Rule 9 requires, “[i]n alleging fraud or mistake, a party must state with
12 particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other
13 conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b).⁹

14 [A] pleading is sufficient under Rule 9(b) if it identifies the circumstances of the
15 alleged fraud so that the defendant can prepare an adequate answer. This notice
16 requirement is satisfied by allegations of the time, place and nature of the alleged
17 fraudulent activities. When a fraudulent statement is alleged, the plaintiff must set
18 forth what is false or misleading about [the] statement, and why it is false. In other
19 words, the plaintiff must “set forth, as part of the circumstances constituting fraud, an
20 explanation as to why the disputed statement was untrue or misleading when made.

21 *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995) (citations, quotations marks, and emphasis
22 omitted).

23 With respect to scienter, a plaintiff only need say it existed, e.g., “defendant knew his statement was
24 false and misleading.” *Id.* at 1082 n.4.

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28 ⁹Defendants reference California cases and the California pleading standard for fraud, *see, e.g.*, RC Mot.
at 4:22-28, but the procedural pleading standard applicable here is Rule 9(b).

1 **C. Analysis**

2 In this case, Setencich has almost pled a fraud claim under sections 1709 and 1710(1) of the
3 California Civil Code, but fails to provide one critical piece of information: When did defendants
4 learn of his association with Jackson? Setencich's story is that Red Cross agents recruited him in
5 mid- to late-2005 for a Communications Manager position. He interviewed three times in Southern
6 California. He went down there based on their continued invitation to do so, and the positive
7 feedback he received from them.

8 More specifically, the agent who reviewed his application told him his criminal conviction
9 was not an absolute barrier to employment. Brown made similar statements to Setencich in late
10 2005 and March 2006. Browning also told him this, though the time period is not indicated.
11 Because he relied on defendants' representations, he did not look for other employment
12 opportunities.

13 Defendants make much of the fact that Setencich fails to detail proof he was *promised* a
14 position. Defendants have a point. The statements noted by Setencich, in paragraphs 24 and 25 of
15 his First Amended Complaint, fall into two groups. The first only indicates he is a viable candidate,
16 e.g., defendants "wanted" to hire plaintiff, or his conviction was not a barrier to hire; but, they do not
17 indicate an offer of employment. First Am. Compl., ¶¶ 24-25. The second group indicates
18 defendants had offered him employment, e.g., they "intended" to hire him, or they confirmed he
19 would be hired. *Id.* The second group, however, lacks the particularity called for by Rule 9(b), as
20 discussed below. Thus, Setencich fails to make a case for promissory fraud.

21 Nonetheless, he does raise another basis for fraud: If defendants told Setencich he was a
22 possible candidate, when in fact they knew he was not, due his association with Jackson, but they
23 wanted to string him along, and kept bringing him back for interviews, knowing he would come if
24 asked, which would have been reasonable response on his part, and due to which he lost economic
25 opportunities, then Setencich could state a claim for fraud.

26 Here, however, Setencich has not stated a claim for fraud. He alleges when defendants made
27 statements to him regarding his criminal conviction, they were lying, and they knew they were lying,
28 as they did not intend to hire him, *due to his association with Jackson. Id.*, ¶ 26. He also alleges,

1 however, defendants decided to hire him, but then attempted to withdraw the decision, *after learning*
2 *of his association with Jackson*.¹⁰ *Id.*, ¶¶ 15, 17.

3 Problematically, Setencich never identifies when defendants or which of them learned of his
4 association with Jackson. For example, when defendants found out, they allegedly attempted to
5 withdraw their hiring decision. It is unclear, however, whether this means Brown and Browning
6 learned of this information before or after they discussed his criminal conviction with him. If after,
7 then they could not have intentionally deceived him.

8 Thus, under Rule 9(b), without this information, his first amended complaint fails to provide
9 sufficient information of any fraud, to which defendants could answer. Nonetheless, because it is
10 not clear this claim could not be saved by any amendment, it will be dismissed without prejudice.
11 *See Sparling v. Daou*, 411 F.3d 1006, 1013 (9th Cir. 2005), *cert. denied*, 546 U.S. 1172 (2006);
12 *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

13 **D. Conclusion**

14 Because he has failed to identify when defendants learned of his association with Jackson,
15 Setencich has failed to state a claim for fraud.

16 **3. Setencich has stated a claim for negligent misrepresentation.**

17 **A. Allegations**

18 The Red Cross alleges Setencich's pleadings are too uncertain, fail to allege any induction of
19 reliance, and focus on future promises, instead of past or existing factual representations. RC Mot.
20 at 5:24-6:8. Brown and Browning make the same arguments. Brown Mot. at 5:18-6:2; Browning
21 Mot. at 5:20-6:3. Setencich argues defendants said they wanted to hire him, and they confirmed as
22 such, and told others as such, inducing him to forego other opportunities. Pl.'s Opp'n to RC
23 at 8:5-16; Pl.'s Opp'n to Brown at 5:25-6:8; Pl's Opp'n to Browning at 6:17-28.

24 **B. Legal Standard**

25 The tort of negligent misrepresentation does not require scienter or intent to
26 defraud. (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 487-488, 275 P.2d 15.) It

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28 ¹⁰ It is unclear what Setencich means by "attempted" and by "withdrew." Apparently, defendants
were successful in their "attempt," but from whom did they withdraw the hire decision?

1 encompasses “[t]he assertion, as a fact, of that which is not true, by one who has no
2 reasonable ground for believing it to be true” (Civ.Code, § 1710, subd. 2), and “[t]he
3 positive assertion, in a manner not warranted by the information of the person making
4 it, of that which is not true, though he believes it to be true” (Civ.Code, § 1572,
5 subd. 2; see *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962, 226 Cal.Rptr. 532
6 [describing elements of the tort]).

7 *Small v. Fritz Cos., Inc.*, 30 Cal.4th 167, 174-75, 65 P.3d 1255 (2003).

8 Justifiable reliance may take the form of acting or not acting, in reliance on a
9 misrepresentation. *Id.* at 175.

10 Unlike a fraud claim, a negligent misrepresentation claim is not subject to Rule 9(b), only to
11 Rule 8, *In re Daou Systems, Inc.*, 411 F.3d 1006, 1028 (9th Cir. 2005), which only requires:

12 (a) Claim for Relief. A pleading that states a claim for relief must contain:

13 (1) a short and plain statement of the grounds for the court’s jurisdiction,
14 unless the court already has jurisdiction and the claim needs no new jurisdictional
15 support;

16 (2) a short and plain statement of the claim showing that the pleader is entitled
17 to relief; and

18 (3) a demand for the relief sought, which may include relief in the alternative
19 or different types of relief.

20 Fed. R. Civ. P. 8(a).

21 As the United States Supreme Court has held:

22 [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail
23 the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a
24 short and plain statement of the claim’ that will give the defendant fair notice of what
25 the plaintiff’s claim is and the grounds upon which it rests.

26 *Conley v. Gibson*, 355 U.S. 41, 103 (1957) (footnote omitted).

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1 **meet and confer** prior to the conference and shall prepare a joint Case Management Conference
2 Statement which shall be filed no later than ten (10) days prior to the Case Management Conference
3 that complies with the Standing Order for all Judges of The Northern District of California and the
4 Standing Order of this Court. Plaintiff(s) shall be responsible for filing the statement as well as for
5 arranging the conference call. All parties shall be on the line and shall call (510) 637-3559 at the
6 above indicated date and time.

7 IT IS SO ORDERED.

8 February 14, 2008

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10 Sandra Brown Armstrong
11 United States District Judge
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